he had shown such industry, patience, kindness and helpfullness as to inspire the faculty and students of his school with respect and gratitude.

Always a most industrious and profound student of the history of the common law, he published some of the results of his studies in the form of essays that will live long after his grateful pupils have themselves passed away. He also compiled and edited valuable collections of cases on the subjects of torts, pleading, bills and notes, partnership, trusts, suretyship, admiralty and equity jurisdiction. It is doubly regrettable that the burden of his cares as dean and teacher not only probably shortened his useful career, but also prevented the accomplishment of a greater amount of literary work.

For about twenty years he had been a member of the American Bar Association, and was of course, always actively interested in questions concerning legal education that were discussed at meetings of the association. For several recent years he also rendered efficient service to the cause of uniformity of legislation as a member of the Conference of Commissioners on Uniform State Laws.

His work has been well done and will live, but he will probably be best remembered by all who knew him for what he was, rather than for what he did. J. H. B.

NECESSITY AND EFFECT OF A THEORY.—That it is advisable for a plaintiff to proceed upon a definite theory will be conceded; and the reasons are obvious. Is it necessary, however, for him to do so? And having adopted one, is he bound by it and must he recover, if at all, upon the one adopted? Selecting a particular instance, can he proceed upon the theory that the defendant is liable in tort and hold him for a breach of contract? In *Cockerell v. Henderson et al.*, — Kansas —, 105 Pac. Rep. 443, decided November 11th, 1909, it is held that a plaintiff may in his pleading adopt one theory and recover upon another. The syllabus in that state is prepared by the court and states the law of the case; and we quote from it as follows:

"In a civil action, which may be founded upon either contract or tort, the plaintiff is not required to state upon which he relies as the basis of the action, and generally, *if he should make such a statement and be mistaken, the statement would be immaterial.* (Italics ours.) All that the plaintiff is required to do is to state facts constituting his cause of action, in ordinary and concise language, and without repetition."

The decision is based upon the code provision abolishing the forms of action. The petition set forth five causes of action, substantially the same, and arising out of the sale of capital stock in a certain company; one was based upon the alleged sale of stock to plaintiff, and four upon sales to others who had assigned to plaintiff; the allegations as to each were substantially the same and in substance as follows:

"That the stock had no value whatever at the time of issuing the same to the palintiff and his assignors; that he and said assignors severally were induced to purchase the same by the fraudulent representations of the defendants; that the aggregate amount of such capital stock sold to the plaintiff and assignors was $5,000, which amount the plaintiff asked to recover

with interest." It was also alleged that defendants appropriated to their own use and benefit the several sums paid as the purchase price for said stock. The case came on for trial upon the petition and a general denial. "A jury was empaneled to try the case and the plaintiff introduced his evidence, and at the close of his evidence the defendants demurred thereto on the ground that it was not sufficient to sustain any judgment in favor of the plaintiff. The demurrer was sustained and to reverse the ruling the plaintiff appealed. During the trial in the court below a controversy arose between the court and plaintiff's attorney as to whether the action was based upon contract or tort, the court indicating that the plaintiff should elect upon which theory he would try the case; this the attorney for the plaintiff refused to do and stated "that he relied only upon his petition," and much space was given to the discussion of this question in the briefs on appeal. The supreme court, in reversing the case, said:

"This discussion and controversy seem quite irrelevant; the only proper consideration being whether the petition states facts constituting a cause of action, and whether the evidence was sufficient to justify the submission of the case to the consideration of the jury. * * * The questions involved in such a case are: (1) Whether the alleged representations were made. (2) Were they false? (3) Were they intended or calculated to induce the transaction? (4) Was the plaintiff, without negligence on his part in failing to inquire or observe, misled to his prejudice? (5) Did he rely upon the false representations as true, and was he induced thereby to enter into the transaction? If these questions are answered favorably to the plaintiff—and it is the province of the jury to answer them—*the plaintiff is entitled to recover, on the theory either that the statements were warranties, or that they were fraudulently made.*" (Italics ours).

The syllabus, the language of the opinion, and the facts of the case justify the conclusion that the court is of the opinion that a plaintiff is not required to adopt a definite theory, is not bound by the one he adopts, that he may found his action upon contract and recover upon a tort and this too, even though he should state that he was proceeding for a breach of contract. Many authorities could be cited in support of the proposition that a plaintiff cannot be turned out of court if the facts alleged and proved entitle him to recover upon any theory; on the other hand many more could be cited to the effect that he can recover only upon the theory adopted. *Cockerell* v. *Henderson et al.* goes so far as to hold that in a civil action which may be founded upon either contract or tort it is not necessary for the plaintiff to rely upon a definite theory and that it would be immaterial if he should state that he relied upon contract when in fact he relied upon a tort for recovery. In our opinion it would be difficult to cite much authority in support of this proposition. Granted that the code requires only that the plaintiff shall "state the facts constituting his cause of action, in ordinary and concise language, and without repetition," it is submitted that the defendant is entitled to know what use the plaintiff seeks to make of his facts and in this sense to prepare to meet them. To permit a plaintiff to establish a liability against

a defendant as for a tort in the face of the plaintiff's statement, though a mistaken one that he seeks to hold him for a breach of contract, would be a manifest injustice.

Mr. Pomeroy, whom no one will accuse of underestimating the effect of the code, says, in § 558 of his CODE REMEDIES: "It is settled by an almost unanimous series of decisions in various states, that if a complaint or petition in terms alleges a cause of action *ex delicto,* for fraud, conversion, or any other kind of tort, and the proof establishes a breach of contract, express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient allegations, if they stood alone, to show a liability upon the contract." And again, in § 561, the same author says: "In addition to the general doctrine, that a party should be truly and fully apprised of the nature of the claim set up against him, there is a special reason why a plaintiff cannot recover for a breach of contract when the cause of action stated in the record is for deceit or any other tort. In many actions of tort the defendant may be taken on a body execution, issued upon the judgment; while a simple breach of contract never exposes him to that liability. If, therefore, a cause of action on contract could be proved and judgment thereon recovered when one for tort was alleged, the record might show a case for arrest on final process, although the issues actually tried involve no such consequence."

Among the cases supporting the doctrine stated by Mr. Pomeroy is the leading one of *Supervisors of Kewaunee County* v. *Decker,* 30 Wis. 624. In this case the plaintiff board of supervisors sought to recover money alleged to belong to the county and to have been converted by the defendant while he was clerk of the board. Counsel for defendant, supposing the action to be one in trover, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. It seems that counsel for the plaintiff practically conceded that the complaint was intended to be one in tort for conversion but at the same time insisted that if not good as a complaint of that kind it was sufficient as a complaint for money had and received. and being sufficient for that purpose, they contended that the demurrer was not well taken. The court below overruled the demurrer and the defendant appealed. The opinion of the supreme court was by DIXON, C. J., who, in reversing the order of the court below, overruling the demurrer, among other things, said:

It would certainly be a most anomalous and hitherto unknown condition of the laws of pleading, were it established that the plaintiff in a civil action could file and serve a complaint, the particular nature and object of which no one could tell, but which might and should be held good, as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon money demand on contract, and one in equity, all combined or fused and molded into one count or declaration, so that the defendant must await the accidents and events of trial, and until the plaintiff's proofs are all in, before being informed with any certainty or definiteness, what he is called upon to meet. The proposition that a complaint, or any

single count of it,may be so framed with a double, treble, or any number of aspects, looking to so many distinct and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proofs at the trial, we must say, strikes us as something exceedingly novel in the rules of pleading. We do not think it is the law, and, unless the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion."

In view of the statement in the syllabus of the principal case that under the code all distinctive forms of civil action are abolished and which seems to be relied upon as a basis for the decision, we may be justified in quoting further from *Supervisors of Kewaunee County* v. *Decker* as follows: "We have often held that the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be. * * * These distinctions continuing, they must be regarded by the courts now as formerly, and now no more than then, except under the peculiar circumstances above noted, can any one complaint or count, be made to subserve the purposes of two or more distinct and dissimilar causes of action at the option of the party presenting it. It cannot be 'fish, flesh, or fowl' according to the appetite of the attorney preparing the dish set before the court. If counsel disagree as to the nature of the action or purpose of the pleading it is the province of the court to settle the dispute. It is a question when properly raised which cannot be left in doubt, and the court must determine with precision and certainty upon inspection of the pleadings to what class of actions it belongs or was intended, whether of tort, upon contract, or in equity, and, if necessary or material, even the exact kind of it within the class must be determined."

Evidently should the plaintiff state that he relies upon contract and afterwards seek to recover upon tort, the Wisconsin court would not consider the statement immaterial even though it was mistakenly made.

In this comment we have not overlooked the fact that the demurrer sustained by the court below was interposed to the *evidence*; and it is admitted that *Supervisors of Kewaunee County* v. *Decker* recognizes a difference in the situation when the question arises after issue joined upon the merits and that presented when it arises upon demurrer to the complaint; and, hence, no criticism is offered respecting the conclusion reached in the case. Our purpose is only to challenge the sweeping statements of the syllabus and of the opinion. T. A. B.

SUBROGATION TO A LIEN FOR ASSESSMENTS OR TAXES—CONSTRUCTION OF THE NEGOTIABLE INSTRUMENTS LAW.—The right of a person ever to claim subrogation to the rights of the state as respects a lien for taxes has been doubted, but whether such right has ever been denied independent of other consideration, such, for example, as the acceptance of something in lieu of cash, does not clearly appear. Such doubt was expressed in *Mercantile Trust Company* v. *Hart,* 76 Fed. 673, 22 C. C. A. 473, 35 L. R. A. 352, and in *Wallace's Estate,* 59 Pa. St. 401. In the former of these cases the tax collector, the county treasurer, accepted checks in payment of taxes due the